

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
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Request by ALTS for Expedited	)	
Clarification of the Commission's Rules	)	CCB/CPD 97-30
Regarding Reciprocal Compensation for	)	
Information Service Provider Traffic	)	
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**COMMENTS OF HYPERION TELECOMMUNICATIONS, INC.  
IN SUPPORT OF REQUEST BY ALTS FOR EXPEDITED  
CLARIFICATION OF THE COMMISSION'S RULES  
REGARDING RECIPROCAL COMPENSATION FOR  
INFORMATION SERVICE PROVIDER TRAFFIC**

Hyperion Telecommunications, Inc. ("Hyperion") submits these comments in support of the request filed by the Association for Local Telecommunications Services (ALTS) for expedited clarification of the Commission's rules. At stake is the entitlement of new entrant competitive local exchange carriers ("CLECs") to receive reciprocal compensation pursuant to section 251(b)(5) of the Telecommunications Act of 1996 ("1996 Act") for the transport and termination of traffic to CLEC subscribers who are information service providers ("ISPs"). Hyperion is a facilities-based competitive local exchange carrier whose subsidiaries and affiliates are currently operating in or preparing to operate in twelve (12) states. Hyperion is authorized to provide local exchange service in states where subsidiaries of NYNEX, Bell Atlantic, Southwestern Bell Telephone Company ("SWBT"), BellSouth, and GTE are the incumbent local exchange carriers ("ILECs"). Hyperion's affiliates have signed nine (9) interconnection agreements with ILECs in the states of Kansas,

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Kentucky, New Jersey, Pennsylvania, Tennessee, Vermont, and Virginia. Hyperion has already received letters from Bell Atlantic and NYNEX taking the position that ISP traffic is not subject to the reciprocal compensation obligation of the 1996 Act and the FCC's Rules, and threatening to withhold payment of reciprocal compensation for these calls. See attached June 23, 1997 letter from Bell Atlantic to Hyperion ("Exhibit A") and April 15, 1997 letter from NYNEX to Hyperion ("Exhibit B"). Hyperion strongly opposes these efforts by ILECs<sup>1/</sup> to avoid their statutory reciprocal compensation obligations under the 1996 Act by not recognizing local calls terminated to an ISP site as local traffic. The ILECs' argument is inconsistent with the 1996 Act, this Commission's *Local Competition Order*, *Universal Service Order*,<sup>2/</sup> and *Access Charge Reform Order*.<sup>3/</sup> It also defies a number of state regulatory decisions which have directly addressed the issue. In so doing, the ILECs are seeking to create a competitive disadvantage for new entrants such as Hyperion, by eliminating their ability to recover their fundamental costs of terminating local traffic to ISP customers pursuant to the terms of their interconnection agreements with ILECs, while ILECs continue to charge their end user customers for the ability to place a call to an ISP. ILECs must pay

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<sup>1/</sup> Hyperion is aware that NYNEX and SWBT have also sent similar letters threatening not to continue paying reciprocal compensation for calls originating from their end user customers and terminating to CLEC ISP customers.

<sup>2/</sup> *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45 (rel. May 8, 1997) ("Universal Service Order").

<sup>3/</sup> *In the Matter of Access Charge Reform*, First Report and Order, CC Docket No. 96-262 (rel. May 17, 1997) ("Access Charge Reform Order").

the underlying costs of each component required to provide such a service to their customers, including the cost of any termination of the local call to an ISP.<sup>4/</sup>

**I. Excluding Local Traffic to ISPs from Reciprocal Compensation Is Inconsistent With the Letter and Intent of the 1996 Act.**

Section 251(b)(5) of the 1996 Act requires *all* local exchange carriers to establish reciprocal compensation arrangements “for the transport and termination of telecommunications.” Neither the 96 Act’s definition of “telecommunications” under Section 3(43), nor the plain meaning of “transport” and “termination” limits this reciprocal compensation requirement to any particular type of call. Furthermore, Section 252(d)(2)(A) of the 96 Act also establishes a pricing standard for charges for the transport and termination of traffic required under Section 251(b)(5):

(A) IN GENERAL.--For the purposes of compliance by an *incumbent local exchange carrier* with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(I) such terms and conditions provide for the *mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier....*

Sec. 252(d)(2)(A)(emphasis added).

Finally, Congress affirmatively announced under the 96 Act the “policy of the United States—(1) to promote the continued development of the Internet...[and](2) to preserve the vibrant

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<sup>4/</sup> Traffic to ISPs is not unique in being predominantly termination traffic. A host of other end users’ traffic patterns can be similarly described, including pizza delivery restaurants, taxi cab companies, airline and hotel reservations lines, credit card companies and customer service centers of virtually all major businesses. ILECs offer DID service which permit many of these institutional customers equipped with Private Branch Exchanges (“PBXs”), including ISPs, only to receive calls, and not to originate them. Therefore, there is no essential difference in directional traffic flow between a CLEC’s DID customers, including ISPs, and Bell Atlantic’s or NYNEX’s DID customers, which include high volume institutional end users, and perhaps also some ISPs.

and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation....”<sup>2/</sup> Preventing CLECs from recovering fair compensation for the use of their network (which in Hyperion’s case, as one of the few facilities-based CLECs operating today has meant a significant investment to construct its own network) to terminate calls to their ISP customers would violate the “mutual and reciprocal recovery by each carrier of costs” of termination of local calls mandated by the 1996 Act. It also would put new entrants such as Hyperion at a tremendous competitive disadvantage. Hyperion has developed business plans to compete in the local exchange market based upon the promise of local competition under the 1996 Act. It has raised the substantial capital necessary to build and has constructed local networks of fiber and switching equipment (often where no other facilities-based competitive alternative to the incumbent exists). It has also developed competitive retail offerings to customers, including ISPs (which advance the federal policy of promoting a “vibrant and competitive free

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<sup>2/</sup> Unfortunately, the flourishing environment for the Internet that has existed up to enactment of the 96 Act could very well be jeopardized if ILECs succeed in withholding fair compensation to CLECs for the termination of local traffic to ISPs. It would be a financial disaster for Hyperion and other new entrants to furnish service to an ISP, since providing that service would result in enormous, uncompensated termination costs. The only practical alternative available to CLECs to recover their costs would be to raise rates to ISPs to cover the lost revenue from ILECs for the termination of these local calls. This could very well force CLECs out of the ISP market, a result that the ILECs have probably factored into their recent strategy. Obviously, this would hinder, rather than advance, Congress’ goal of fostering local competition by passing the 96 Act. Secondly, this outcome would have the doubly negative effect of reducing competitive services available which serve as a catalyst for a “vibrant” ISP market, and would result in increased costs to ISPs, and in turn ISP customers. Bell Atlantic and others would enjoy a *de facto* monopoly over ISP end users, all as a result of turning the reciprocal compensation scheme set out in Section 251(b)(5) of the 96 Act on its head.

market that presently exists for the Internet and other interactive computer services”<sup>4/</sup>), and entered into numerous interconnection agreements with ILECs such as Bell Atlantic, NYNEX, BellSouth, GTE and SWBT which do not differentiate between local traffic terminated to ISPs from that to any other class of end user customer.

This Commission has already concluded in its *Local Competition Order* that “the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.” *Local Competition Order*, ¶1034. Instead, the Commission’s Rule 51.701(a) limits reciprocal compensation to “local telecommunications traffic,” defined as traffic that “originates and terminates within a local service area established by the state commission.” Rule 51.701(b)(1). Bell Atlantic and other ILECs theorize that “the great majority of calls” delivered to ISPs do not “terminate” at the ISP’s “local office,” but at the site of the ultimate end point of any related calls made to another network by the CLEC’s ISP customer (even though the CLEC does not carry any interexchange portion of the call). However, neither the *Local Competition Order*, the 96 Act, nor other Commission orders support the ILECs’ position. Nor do the overwhelming pertinent policy considerations support the ILECs’ position. Therefore, the Commission should exercise its discretion to clarify its rule and the *Local Competition Order* by expressly providing that they were not intended to exempt local calls terminated to ISPs from reciprocal compensation.

## **II. The *Local Competition Order* Did Not Exempt ISP Traffic From Reciprocal Compensation.**

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<sup>4/</sup> 47 U.S.C. § 230(b)(2).

The Commission ruled in the *Local Competition Order* that the reciprocal compensation requirement “does not apply to the transport or termination of interstate or intrastate interexchange traffic.” *Local Competition Order*, ¶ 1034. It is this ruling that ILECs seek to apply to the termination of local calls to ISPs.

However, the ILECs overextend the scope of the Commission’s ruling in the *Local Competition Order*. The Commission explained that the “Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.” *Id.*, ¶ 1033. Although the Commission has distinguished between the pricing standards for terminating local calls and the access charges for interexchange calls, it has not failed to address how ISP traffic is to be considered. The Commission has already determined that ISP traffic is not subject to interexchange access charges. *Access Charge Reform Order*, ¶¶ 344, 345. Further, the Commission has repeatedly affirmed the rights of ISPs to employ local exchange services, under *intrastate* tariffs, to connect to the public switched telecommunications network.<sup>21</sup> In fact, the Commission recently reconfirmed that the connection from an end user to the ISP is a *local*, as opposed to interexchange call: “[t]o maximize the number of subscribers that can reach them *through a local call*, most ISPs have deployed points of presence.” *Id.*, n.502 (emphasis added). Consistent with the treatment of the connection between end user and ISP as a local call, while all providers of interstate services must contribute to the Universal Service Fund, the FCC excludes ISPs from this obligation. *Universal Service Order*, ¶¶ 787-788. In short, this Commission has consistently recognized as a “local call” end user calls to

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<sup>21</sup> *Amendments to Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, ¶ 2 n.8 (1988).

ISP local "points of presence." The mere fact that an ISP may enable a caller to access the Internet network through packet switching or another interactive computer service does not alter the legal status of the connection between the customer and the ISP as a "local call."<sup>8/</sup>

The fact that ILECs charge their own customers local rates for traffic to ISPs, and classify such traffic as local for purposes of interstate separations,<sup>9/</sup> prove that ILECs themselves consider such traffic to be local and eligible for reciprocal compensation. Indeed, many ILECs have been paying reciprocal compensation for this traffic to CLECs pursuant to their reciprocal compensation agreements and state tariffs, and have presumably also been receiving such compensation from CLEC end user customers who place local calls to ISP subscribers of ILEC local services.

In addition, if the RBOCs' posit that this traffic is interstate rather than local, they are barred from carrying it; otherwise, RBOCs would violate Section 271 of the 1996 Act each time one of their customer(s) connect with an ISP in their service area. Certainly, the RBOCs cannot intend that the Commission draw such a conclusion by defining them as interstate or international calls.

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<sup>8/</sup> While the ILECs may contend that there are unique costs associated with ISP traffic, the Commission is now considering comments on this issue in a separate proceeding. *See In the Matter of Usage of the Public Switched Network by Information Service and Internet Access Providers*, Notice of Inquiry, CC Docket No. 96-263 (rel. Dec. 24, 1996). Hyperion suggests that mechanisms designed to resolve issues relating to alleged switch congestion related to Internet usage should be addressed in that proceeding, or in state tariff proceedings, rather than on a unilateral basis by ILECs by denying recovery of reciprocal compensation to their competitors.

<sup>9/</sup> *See* May 29, 1997 letter of Acting Director, Communications Division, New York Department of Public Service to NYNEX (attachment to ALTS Petition), at 1. The New York Commission further stated that NYNEX should not unilaterally change its reciprocal compensation mechanism, and "[i]n the interim, we expect NYT to pay compensation to local exchange carriers for termination to any Internet Service Providers, and to pay withheld compensation for any such previously delivered traffic." *Id.* at 2.

The ILECs' position has already been rejected by six state regulatory agencies for the reasons previously discussed. In addition to the New York Public Service Commission,<sup>10/</sup> the regulatory commissions of Arizona,<sup>11/</sup> Colorado,<sup>12/</sup> Minnesota,<sup>13/</sup> Oregon,<sup>14/</sup> and Washington<sup>15/</sup> have all declined to treat traffic to enhanced service providers, including ISPs, any differently than other local traffic.

### **III. THE TERMS OF BELL ATLANTIC'S INTERCONNECTION AGREEMENT DO NOT AUTHORIZE IT TO WITHHOLD RECIPROCAL COMPENSATION FOR LOCAL CALLS TO ISPs.**

ILECs, by focusing upon the ISP handling of an ISP customer's call *after* the local call is terminated by the CLEC to the ISP local number, attempt to argue that if a call is classified as "interexchange" for one purpose (i.e. as a gateway to the Internet), it must be classified as

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<sup>10/</sup> See NYPSC May 29, 1997 letter to NYNEX, attached to ALTS Request.

<sup>11/</sup> *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996*, Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 et al. (Arizona Corp. Comm. Oct. 29, 1996) at 7.

<sup>12/</sup> *Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc.*, Decision Regarding Petition for Arbitration, Docket No. 96A-287T (Col. PUC Nov. 5, 1996) at 30.

<sup>13/</sup> *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Minn. PUC Dec. 2, 1996) at 75-76.

<sup>14/</sup> *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996*, Commission Decision, Order No. 96-324 (Ore. PUC Dec. 9, 1996) at 13.

<sup>15/</sup> *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc., Pursuant to 47 USC § 252*, Arbitrator's Report and Decision, Docket No. UT-960323 (Wash. Utils. and Transp. Comm. Nov. 8, 1996) at 26.



"interexchange" for all purposes, and for all components, however local they are (as in the local call terminated to the ISP). As discussed above, this artful fiction devised by the ILECs contradicts the ILECs' own treatment of these ISP calls as *local*, rather than interexchange, and would be in violation of Section 271 by providing this service.

Furthermore, the terms of ILEC interconnection agreements with Hyperion<sup>16/</sup> offer no support for an exemption of ISP traffic from Bell Atlantic's reciprocal compensation obligations. For example, notwithstanding Bell Atlantic's conclusory statements (Exhibit A at 1), the actual language of Sections 1.44, 1.61, 1.70 and 5.72 of the BA Agreement unequivocally establish, without exception for local traffic to ISPs, the parameters for reciprocal compensation between Bell Atlantic and Hyperion for the termination of *all* local traffic:

1.44 "Local Traffic," means traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ("EAS") area, as defined in BA's effective Customer tariffs, or, if the Commission has defined local calling areas applicable to all LECs, than as so defined by the Commission.

1.61 "Reciprocal Compensation" is As Described in the Act, and refers to the payment arrangement set forth in subsection 5.7 below.

1.70 "Telecommunications" is As Defined in the Act.

5.72 The Parties shall compensate each other for the transport and termination of Local Traffic *in an equal and symmetrical manner* at the rates provided in the Detailed Schedule of Itemized Charges (Exhibit A hereto) or, if not set forth therein, in the applicable Tariff(s) of the terminating Party, as the case may be....

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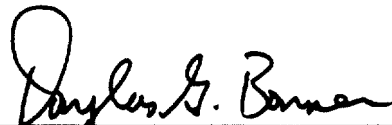
<sup>16/</sup> See e.g., *Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 Dated as of January 14, 1997 by and between Bell Atlantic-Pennsylvania, Inc. And PECO Hyperion Telecommunications; Hyperion Telecommunications of Harrisburg; and Hyperion Telecommunications of Pennsylvania, Inc. (Revised as of 5/15/97). ("BA Agreement")*.

(Emphasis added). These sections alone illustrate the essential inconsistency between the "spin" that Bell Atlantic, NYNEX and other ILECs have put on the payment of reciprocal compensation for termination of local traffic to ISPs, and the ILECs' actual contractual obligation. Bell Atlantic has formally advised that all traffic delivered by Bell Atlantic that is terminated to Hyperion's ISP customers "shall be disputed by BA subject to the dispute procedures" in the BA Agreements [in Pennsylvania, New Jersey, and Virginia]. Hyperion requests that the Commission rule on the ALTS petition to clarify that this local traffic should receive reciprocal compensation from the ILECs, to avoid the potential financial harm resulting to Hyperion from lack of payment and the legal expense that lengthy dispute resolution procedures, including possible multiple state judicial or regulatory proceedings pursuant to paragraph 29.9 of the Agreement would entail.

#### IV. CONCLUSION

For these reasons, the Commission should clarify its Rules governing reciprocal compensation as requested by ALTS.

Respectfully submitted,



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Dana Frix  
Douglas G. Bonner  
Swidler & Berlin, Chartered  
3000 K Street, N.W., Suite 400  
Washington, D.C. 20007  
(202) 424-7500 (Tel.)  
(202) 424-7645 (Fax)

## **EXHIBIT A**

Bell Atlantic Network Services, Inc.  
Two Bell Atlantic Plaza  
1320 North Court House Road  
Ninth Floor  
Arlington, Virginia 22201  
703 974-8000  
FAX 703 974-6431

Patrick A. Hanley  
President  
Carrier Services

June 23, 1997

**CERTIFIED MAIL RETURN RECEIPT REQUESTED**

Vice President, Regulatory and Legal Affairs  
Hyperion Telecommunications, Inc.  
2670 Boyce Plaza Road  
Pittsburgh, PA 15241

Dear Sir:

This letter addresses an issue that has arisen in the course of the implementation of interconnection agreements between Bell Atlantic (BA) and CLECs, including Hyperion Telecommunications, Inc. and New Jersey Fiber Technologies (collectively and individually "Hyperion"). BA has become aware that some CLECs have included telephone calls handed off to Internet Service Providers (ISPs) for carriage over the Internet in the reciprocal local call compensation and associated interconnection charges that the CLEC bills to BA. BA may have also included some ISP traffic in the local call compensation that it bills to CLECs.

It is inconsistent with the terms of the interconnection agreements between BA and Hyperion to bill reciprocal compensation for calls made through an ISP. The great majority of calls handed off to an ISP do not terminate at the ISP's local office. Rather, many ISP calls are placed for the purpose of using the ISP as a gateway to another telecommunications network, ie. the Internet, which then carries the call to locations outside the local calling area – often across the country or internationally. Telephone calls made to complete a connection over the Internet are not "Local Traffic" within the meaning of the interconnection agreements. In particular, such traffic does not "terminate[] to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ("EAS") area..." as defined in the agreements. Internet access traffic does not terminate either on a "Party's network" nor "within a given local calling area."

Accordingly, BA hereby:

- (1) Requests that Hyperion provide, within 30 days of the date of this letter, a factually-supported estimate of the portion of the traffic, if any, that BA has sent in each of the last two billing months to the Hyperion interconnection point and which Hyperion has in turn delivered to an ISP (including any Hyperion affiliate that is an ISP). Please explain the methodology used by Hyperion to develop these estimates. BA will also consider any

June 23, 1997

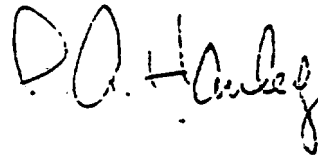
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estimates of traffic that Hyperion has sent to BA that BA has delivered to an ISP that Hyperion can provide.

- (2) Provides notice that any traffic delivered by BA to Hyperion, which Hyperion delivers to an ISP but seeks reciprocal compensation charges from BA, shall be disputed by BA subject to the dispute procedures contained in section 29 of the BA/Hyperion interconnection agreements.
- (3) Agrees to similar disputed amount procedures with respect to any ISP traffic delivered by Hyperion to BA, pursuant to the above paragraphs.

You may contact me on (703) 974-4800 with any questions or to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "D. A. Harley". The signature is written in a cursive, slightly stylized font.

cc: Douglas Bonner, Esq.  
Dana Frix, Esq.  
Swidler & Berlin  
3000 K Street, N.W.  
Suite 400  
Washington, DC 20007

## **EXHIBIT B**

NYNEX

222 Bloomingdale Road, White Plains, NY 10605

Tel: 914 644 4758

Fax: 914 644 0902

Patrick A. Garzillo

Managing Director, Local Carrier Markets

**NYNEX**

April 15, 1997

Randolph S. Fowler

Vice President

Hyperion Telecommunication

Boyce Plaza 111 2570 Boyce Plaza Road

Pittsburgh PA 15241

Dear Randolph:

NYNEX has been receiving bills seeking reciprocal compensation for traffic that is being delivered to Internet Service Providers ("ISPs"). It is our view that such traffic is interstate in nature and not eligible for reciprocal compensation under the FCC's rules.

NYNEX is conducting a study to determine the number of minutes that were delivered to ISPs in February of this year. Once this study is completed, we will then ask that you issue us a credit for any reciprocal compensations bills that we have already paid. If our study shows that you delivered Internet traffic to us, we will issue an offsetting credit. In addition, we would like you to agree that neither of us will include Internet traffic in future bills for reciprocal compensation.

Please confirm your agreement by signing the enclosed copy of this letter. If we cannot reach an agreement, NYNEX will withhold payment of reciprocal compensation bills pending resolution of this issue. We hope that will not be necessary.

If you have any questions, I will be glad to discuss this matter further with you.

Sincerely,

*PA Garzillo*  
(PA)

Agreed to:

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